U.S. Department of Labor

Board of Alien Labor Certification Appeals
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CASE NO: 95-INA-199 December 7, 2000

In the Matter of

DR. THOMAS EMMER,
Employer,

on the behalf of

MUSTAFA SELCUK SOYLUOGLU,
Alien,

Before: Burke, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Dr. Thomas Emmer's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted all regulations cited in this decision are in Title 20.

Under § 1182 (a)(5)(A) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined or certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S.

workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(C).

STATEMENT OF THE CASE

On August 13, 1992, Employer filed a Form ETA 750 Application for Alien Labor Certification with the New Jersey Department of Labor ("NJDOL") on behalf of the Alien, Mustafa Selcukoylouglu AF 13. The job opportunity was listed as Dental Technician and required two years in the job offered or a university degree in dentistry. *Id.* The job duties were described as follows:

> Constructs and repairs dental appliances. Assists in taking impressions for dentures, pours up models, selects and sets teeth, along with patients selects their aesthetics, processes dentures using the Ivocap system (an injection molding technique) and assists dentist with delivering dentures to patients. *Id.*

After the job was advertised, the NJDOL forwarded two resumes to Employer. AF 44-47, 53-55, 66. Employer rejected Monika Hartel because she had worked for him before and was "not trainable." AF 52. Employer claimed that Clark Chasten never responded to his request for an interview. AF 58.

The CO issued a Notice of Findings ("NOF") on March 31, 1994, proposing to deny labor certification. AF 70. The CO found that the sole related occupation requirement of a university degree in dentistry to be restrictive, in violation of the Act, because other related occupations should apply for a Dental Technician position. AF 69. She also found one of the applicants qualified for the position. AF 67-68. Employer's rebuttal to the NOF was filed on May 9, 1994. AF 80-83. Employer asserted that the alternative requirement of a university degree in dentistry is appropriate for a Dental Technician position as it had been approved in two previous cases that were enclosed with the rebuttal and a university degree is often used as a substitute for experience in the job offered. AF 76-82. Additionally, Employer stated that Mr. Chasten never responded to his certified letter offering him an interview. AF 80-81. Employer offered to amend his application to include a special requirement of knowledge of the Ivocap system. AF 80.

The CO issued a second NOF on May 16, 1994. AF 84-88. The CO stated that she accepted the requirements of the job as two years of experience in the job offered or a university degree in dentistry and suggested that Employer amend the application to indicate that a degree in dentistry is acceptable in lieu of two years in the job offered. AF 86. The CO then questioned the Ivocap requirement. *Id.* The CO found the Ivocap requirement fine in conjunction with the two years of experience but not with the university degree because Ivocap is not part of the normal requirements of a dentistry degree. AF 86. The CO still found Mr. Chasten qualified. AF 85.

Employer filed rebuttal to the second NOF on June 21, 1994. AF 186. Employer amended the Form ETA 750 by deleting the related occupation portion and installing "In lieu of 2 years experience in the job offered, a university degree in dentistry is acceptable" in section 15 under special requirements. AF 185, 232. Employer also added in section 15 that the applicant "[m]ust be able to process dentures using the Ivocap system, said ability may be acquired by education, internship, training, or experience." *Id.* He stated that any applicant must be able to use the Ivocap system regardless of whether they have the two years in the job or a university degree in dentistry. AF 184-185. Employer submitted various publications in support of his contention that a person with a university degree in dentistry learns to process dentures. AF 95-180. Employer also argued that the Ivocap requirement is supported by business necessity. AF 183. He offered to amend and re-advertise either with the present requirements or as proposed by the CO. *Id.*

A third NOF was issued on July 5, 1994. AF 189. The NOF was issued "[b]ecause of an error in the second notice of findings which noted the acceptability of the Employer's alternate requirements . . ." AF 188. The CO stated that it "was an error to suggest that a degree in dentistry is an acceptable alternative to experience in the job offered; a university degree is not a normal or usual requirement for a Dental Technician." *Id.* As such, the CO found the degree requirement to be restrictive, in violation of the Act, because it is not the normal or usual requirement for this occupation. *Id.* The CO, therefore, required that Employer rebut by demonstrating business necessity or delete the dentistry degree requirement. AF 187. In order to demonstrate business necessity, the CO demanded that Employer document that a university degree is a normal requirement for hire of a Dental Technician. *Id.*

Employer submitted rebuttal to the third NOF on August 4, 1994. AF 194-197. Employer asserted that "a university degree in dentistry as an alternative in lieu of two years experience as a dental technician is a reasonable acceptable alternative mandated by business necessity." AF 196. He again cited to the publications submitted with his second rebuttal in support of his alternative requirement.

The CO issued a Final Determination ("FD") on August 17, 1994, denying labor certification. AF 200. The CO found that Employer had not adequately documented business necessity for the alternative requirement of a university degree in dentistry. AF 198. Employer filed a Motion for Reconsideration and Request for Review on September 22, 1994. AF 237-239. The Request for Reconsideration was denied on October 31, 1994. AF 240.

DISCUSSION

The main issue in this case is whether Employer has documented that the alternative requirement of a university degree in dentistry is either normal for a Dental Technician or arises from business necessity. The applicable regulation under the Act requires that:

> (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
> (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:

(A) Shall be those normally required for the job in the United States;
(B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* . . . .
20 C.F.R. § 656.21(b).

The CO in the third NOF required that Employer, as part of his documentation of business necessity, demonstrate that the dentistry degree requirement is a normal requirement for a Dental Technician. AF 222. The above regulations, however, separate the finding of normality from documenting business necessity. If the requirement is normal for the occupation, a showing of business necessity is not required. The CO was therefore wrong in requiring Employer to demonstrate that a degree in dentistry is normal as a part of documenting business necessity. The normal or usual component is a preliminary finding before employer documents business necessity. *Avanti Restaurant & Club,* 93-INA-320 (Sept. 27, 1994).

Since this matter came to the Board, the full Board squarely addressed the issue presented herein, in *Francis Kellogg, et al.,* 94-INA-465and 544, 94-INA-068 (Feb. 2, 1998) *(en banc).* In *Kellog,* the Board held that:

> any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employers stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those defined for the job in the D.O.T., and shall not include requirements for a language other than English (20 C.F.R. §656.21(b)(2)).

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The Board in Kellogg also acknowledged that there may be instances where a job offer contains legitimate alternative job requirements, "which can, and should be permitted in the labor certification process."

> Thus, where an employer's primary requirement is considered normal for the job in the United States, and the alternative requirement is found to be substantially equivalent to that requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a §656.21(b)(2) analysis.

Id.

In this case, the CO denied the application because she found that the alternative job requirement of a university degree in dentistry does not arise out of business necessity and is not normally required for the job in the United States. This reasoning is flawed because if a requirement is normal for the occupation, a showing of business necessity is not required. Because of this erroneous instruction by the CO and the decision in *Kellogg*, this matter should be remanded to the CO for issuance of a new NOF.

ORDER

The Certifying Officers decision denying labor certification is REVERSED and the case is remanded to the Certifying Officer for further proceedings consistent with this decision.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

San Francisco, California